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IN THE

Supreme Court of the United States

October Term, 1949

No. 62

62

ROY COLE and LOUIS JONES, *Petitioners*

v.

STATE OF ARKANSAS, *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR THE PETITIONERS

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OPINION BELOW

The opinion of the Supreme Court of Arkansas appears in the Record at p. 115, and is reported at 216 S.W. 2d 402, and at 23 LRRM 2334. It has not yet been officially reported.

JURISDICTION

The decree of the Supreme Court of Arkansas was entered on January 10, 1949 (R. 114). On April 5, 1949, Mr. Justice Rutledge signed an order extending the time for filing a petition for writ of certiorari to and including May 10, 1949 (R. 125). This Court granted certiorari on June 13, 1949. 337 U.S. 929. The jurisdiction of this Court rests on 28 U.S.C. 1257(2) and (3).

STATUTE INVOLVED

Act 193, Acts of Arkansas, 1943
(Popes Digest Stats. Ark., 1944 Cum. Supp. p. 691)

Section 1. It shall be unlawful for any person by the use of force or violence, or threat of the use of force or violence, to prevent or attempt to prevent any person from engaging in any lawful vocation within this State. Any person guilty of violating this section shall be deemed guilty of a felony, and upon conviction thereof shall be punished by confinement in the State Penitentiary for not less than one (1) year, nor more than two (2) years.

Section 2. It shall be unlawful for any person acting in concert with one or more other persons, to assemble at or near any place where a "labor dispute" exists and by force or violence prevent or attempt to prevent any person from engaging in any lawful vocation, or for any person acting either by himself, or as a member of any group or organization or acting in concert with one or more other persons, to promote, encourage or aid any such unlawful assemblage. Any person guilty of violating this section shall be deemed guilty of a felony, and upon conviction thereof shall be punished by confinement in the State Penitentiary for not less than one (1) year, nor more than two (2) years.

Section 3. The term "labor dispute" as used in this Act shall include any controversy between an employer and two (2) or more of his employees concerning the terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment.

Section 4. The provisions of this Act shall be cumulative of all other existing articles of the Penal Code upon the same subject, and in the event of a conflict between existing articles and the provisions of this Act, then and in that event the provisions, offenses and punishments set forth herein shall prevail over such existing articles.

Section 5. If any section, paragraph, clause, or provision of this Act is declared unconstitutional, inoperative or invalid by any court of competent jurisdiction, the same shall not affect or invalidate the remainder of this Act.

STATEMENT

Cole and Jones, the petitioners, together with Jessie Bean, were originally indicted by an Arkansas state court grand jury in January, 1946, for using "force and violence" to "prevent Otha Williams from engaging in working as a laborer at the Southern Cotton Oil Company" (R. 6). The indictment was thus evidently meant to allege a violation of Section 1 of Act 193 of the 1943 Arkansas Acts, set out above, or possibly a violation of the first part of Section 2 of that Act.

The three defendants were convicted, but on appeal the Supreme Court of Arkansas reversed on a question of admissibility of evidence, and remanded for a new trial. *Cole et al. v. State*, 210 Ark. 433, 196 S.W. 2d 582.

Following the reversal, the Prosecuting Attorney filed the felony information involved in this proceeding. This information reads in full as follows (R. 1):

> Comes Sam Robinson, Prosecuting Attorney within and for Pulaski County, Arkansas, and in the name, by the authority, and on behalf of the State of Arkansas information gives accusing Roy Cole, Louis Jones and Jessie Bean of the crime of felony, committed as follows to-wit: On the 26th day of December, A. D. 1945, in Pulaski County, Arkansas, Walter Ted Campbell, acting in concert with other persons, assembled at the Southern Cotton Oil Company's plant in Pulaski County, Arkansas, where a labor dispute existed, and by force and violence prevented Otha Williams from engaging in a lawful vocation. The said Roy Cole, Louis Jones and Jessie Bean, in the County and State aforesaid, on the 26th day of December, 1945, did unlawfully and feloniously, acting in concert with each other, promote, encourage and aid such unlawful assemblage, against the peace and dignity of the State of Arkansas.

The information thus charged Cole, Jones and Bean with violating the second part of Section 2 of the Act, which deals with aiding an unlawful assemblage. It did not repeat the charge of the earlier indictment that they by force and violence prevented Otha Williams from working; on the contrary, this conduct was attributed to Walter Ted Campbell, who, being deceased, was not indicted.

The testimony at the trial may be briefly summarized as follows:

Petitioners are two Negroes,[1] who were employed by the Southern Cotton Oil Company in North Little Rock, Arkansas. On December 17, 1945, about 112 of the plant's 117 workers, including petitioners, went out on strike for higher wages—sixty cents an hour—and an eight hour day (R. 14-16, 62-63). Five employees did not strike, and continued to work (*Id*). On December 26, 1945, the five non-striking employees left the plant in a group at the close of work. Near the plant and across a railroad track were several of the strikers. The testimony differs as to their identity and number, but some of the state's testimony placed Cole and Jones in the group. One of the strikers, identified by the state's witnesses over his denial as Louis Jones, called to Otha Williams, one of the non-strikers, and asked him to wait. Williams refused. Walter Ted Campbell, a striker, then attacked Williams. The two men fought, and Williams killed Campbell with a pocket knife (R. 19-22, 24, 25, 28, 29, 34-36, 42-45, 76). Williams then proceeded to his home (R. 45), the other four non-strikers having already left the scene of the fight (R. 21-22, 31-32, 36, 79). The record is clear that no one other than Campbell attacked, fought or hit Williams (R. 37, 38, 45, 54, 55).

Shortly thereafter the Company secured a state court injunction against further picketing, and within two or three weeks the plant resumed full production (R. 16).

At the conclusion of the trial, the court read Section 2 of Act 193 to the jury, but not Section 1. And it gave the following instruction as to the meaning of Section 2 (R. 94):

> You are instructed that this section of the Act includes two offenses, first, the concert of action between two or more persons resulting in the prevention of a person by means of force and violence from engaging in a lawful vocation. And, second, in promoting, encouraging or aiding of such unlawful assemblage by concert of action among the defendants as is charged in the information here. The latter offense is the one on trial in this case.

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[1] The record designates Negro witnesses by the symbol "(CM)." See R. 70 (Jones), 77 (Cole). The same symbol is used in the information (R. 1).

The court also gave the following instruction (R. 95):

> If you believe from the evidence in this case beyond a reasonable doubt that on or about the 26th day of December, 1945, Walter Campbell, acting in concert with other persons, assembled at the Southern Cotton Oil Company's plant in Pulaski County, Arkansas, where a "labor dispute" existed and by force and violence prevented Otha Williams from engaging in a lawful vocation; and if you further believe beyond a reasonable doubt that the defendants wilfully, unlawfully and feloniously, which [sic] acting in concert with each other, promoted, encouraged and aided such unlawful assemblage, you will convict the defendants as charged in the indictment.

All three defendants were again convicted, and were each sentenced to serve a year in the state penitentiary (R. 25, 26, 27). Petitioners and Bean again appealed, on the ground, among others, that Section 2, if construed to sustain the conviction, was unconstitutional.

The Supreme Court of Arkansas, with one Justice dissenting, affirmed the convictions of petitioners Cole and Jones (R. 104). The conviction of Bean was reversed (two Justices dissenting) with directions that the case be dismissed as to him, on the ground that the evidence was not sufficient to sustain his conviction (R. 104-105).

In its opinion the Supreme Court of Arkansas asserted that the information accused petitioners of using force and violence to prevent Williams from working; that such conduct was made unlawful by Section 1; that it was therefore unnecessary to consider the questions which were raised as to the constitutionality of Section 2; and that there was evidence to sustain the convictions of Cole and Jones (R. 106-107). One Justice dissented on the latter point (R. 108).

A petition for rehearing was filed, which pointed out that the convictions had been affirmed under an entirely different section of the statute than that which petitioners had been charged with, and tried for, violating (R. 108-109). The petition also urged that this variance deprived petitioners of due process (*Id.*). The petition for rehearing was promptly denied (R. 109.)

This Court granted certiorari (332 U.S. 834), and unanimously reversed the convictions (333 U. S. 196). This Court pointed out (333 U. S. at 200-201) that the trial judge had:

> charged the jury that petitioners were on trial for the offense of promoting an unlawful assemblage, not for the offense "of using force and violence"

but that the State Supreme Court had affirmed the convictions of petitioners "as though they had been tried for violating § 1, an offense for which they were neither tried nor convicted.".

This Court held that the Supreme Court of Arkansas had thereby deprived petitioners of procedural due process, in two respects. In the first place, the Arkansas Supreme Court had affirmed petitioners' convictions upon a charge on which they had never been tried. This court declared (333 U. S. at 201):

> It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

Secondly, this Court held that the proceedings in the Arkansas Supreme Court were a part of the process of law under which petitioners' convictions must stand or fall, and that those proceedings violated due process by denying petitioners fair review of the issues raised by them in the trial court, and upon which they had appealed. With respect to this point, this Court said (333 U. S. at 202):

> To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.

On remand, the Supreme Court of Arkansas, on October 25, 1948, handed down an opinion again affirming the convictions of petitioners. This opinion has since been withdrawn by the court, and is not included in the transcript of record certified by its clerk, but is unofficially reported at 23 LRRM 2022. In this opinion the Arkansas Supreme Court stated (23 LRRM 2024):

Insofar as it involves the case herein before us, Sec. 2 of the Act requires as essential to a conviction a finding of concurrent facts as follows:

(1) The defendants "acting in concert with one or more persons";

(2) Did assemble at or near a place;

(3) Where a labor dispute exists; and

(4) By force or violence did prevent or attempt to prevent Otha Williams from engaging in any lawful vocation.

The remaining portion of Sec. 2 of the Act relates to a situation not involved in this case, and will be later discussed. The four essentials above are the only ones that we need consider in weighing the facts here.

The court then went on to review the evidence on each of these four points and concluded (23 LRRM 2025):

There is sufficient evidence to support the verdict of the jury that the defendants "by force or violence prevented or attempted to prevent" Otha Williams "from engaging in any lawful vocation" at the time and place where these defendants, acting in concert, were assembled near a place where a labor dispute existed.

The state court then repeated (23 LRRM 2025):

Now, as previously stated, there is other language in Sec. 2 which reads: "* * * or for any person acting either by himself, or as a member of any group or organization or acting in concert with one or more other persons, to promote, encourage or aid any such unlawful assemblage * * *."

We express no opinion on the validity or effect of this language until a case involving it is duly presented to us. This last quoted language relates to an offense entirely different from the case here at bar.

The court then went on to sustain the constitutionality of the first part of Section 2 of the Act.

A petition for rehearing was once more filed. It pointed out that the Arkansas Supreme Court, in violation of due process and in disregard of the opinion of this Court, had again reviewed the convictions as if they were for using force and violence, although petitioners had been tried only for aiding an unlawful assemblage. This time the court had reviewed

the conviction under the first part of Section 2, instead of under Section 1, but while both of those provisions deal with the use of force and violence to prevent another from working, the latter part of Section 2 deals with aiding an unlawful assemblage, and it was only on the latter charge that petitioners had been tried.

Following the filing of this petition the Arkansas Supreme Court withdrew its opinion, and on January 10, 1949, it handed down its fourth opinion [1] (R. 115). It is this opinion and judgment which is now before this Court for review.

In its latest opinion, the Arkansas Supreme Court affirms the convictions for the third time, and at last purports to review the sufficiency of the evidence to sustain the convictions under the latter part of Section 2, that dealing with aiding an unlawful assemblage. It is, however, by no means clear from the opinion whether or not the State Supreme Court reviewed the convictions upon the basis of the interpretation of the statute and of the information upon which the case was tried, or whether, in disregard of this Court's opinion and mandate, it again reviewed the convictions upon the basis of a construction of the statute and information different from that upon which the case was tried.

As appears *supra* pp. 3–5, the theory on which petitioners were tried required nothing more for conviction than that the petitioners were present on a picket line where violence to prevent another from working did in fact occur. While some parts of the latest opinion of the Arkansas Supreme Court seem to give the statute the same construction, other portions of that opinion apparently read into the latter part of Section 2 the requirement that the accused must have promoted the assemblage with the intention that force and violence would be used to prevent a person from working.

Thus, the opinion first construes the latter part of Section 2 as applying to any person who promotes or aids "an assemblage which by force or violence prevents or attempts to prevent any person from engaging in any lawful vocation"

[1] The statement in the second sentence of the opinion "that this is the third opinion of this court" ignores the withdrawn opinion of October 25, 1948, which the court had likewise labeled as its third.

(R. 119). In the very next paragraph, however, the opinion defines the unlawful assemblage prohibited by the Act as one where persons "have assembled in an attempt to prevent by force or violence" some other person from working. The opinion then goes on to declare that the statute in question "is aimed at the same generic offense" as an earlier statute making it a crime to "assemble together with the intent" to riot (R. 120-121), and to uphold the constitutionality of the statute in part upon that analogy (R. 122).

Next, however, the opinion again reverts to the construction given the statute by the trial court (R. 122):

> The Act prevents unlawful assemblages which cause violence and interfere with the rights of others.

Finally, after reviewing the evidence, the opinion states that the "defendants participated, aided, encouraged and abetted in an agreement with others to the effect that the workers • • • would be whipped if they did not agree to quit work" (R. 122-124). Summing up, the opinion concludes that the assemblage was unlawful "because of its purpose and its accomplished results" (R. 124).

Thus, it is impossible to say whether or to what extent the Arkansas Supreme Court, in its latest opinion, read into the statute a requirement that the accused must have promoted the assemblage with the intention that violence would there be used.

This Court granted certiorari, and ordered the case placed on its summary docket, on June 13, 1949. 337 U. S. 929.

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Arkansas erred:

1. In depriving petitioners of procedural due process in violation of the Fourteenth Amendment.

2. In disregarding, and failing to give proper effect to the opinion and mandate of this Court at the 1947 Term in *Cole* v. *Arkansas*, 333 U.S. 196.

3. In affirming the convictions of petitioners upon the basis of a construction of the state statute (the second part of Section 2 of Act 193, Acts of Arkansas, 1943) different from

that upon which petitioners had been charged and tried, thereby depriving petitioners of procedural due process, in violation of the Fourteenth Amendment.

4. In affirming petitioners' convictions upon a charge on which they had not been tried, thereby depriving petitioners of procedural due process, in violation of the Fourteenth Amendment.

5. In refusing to review the issues upon which petitioners appealed to it from the trial court, thereby depriving petitioners of procedural due process, in violation of the Fourteenth Amendment.

6. In affirming the convictions of petitioners under a statute (the second part of section 2 of Act 193, Acts of Arkansas, 1943) which makes it a crime to be present on a picket line where violence is used to prevent a person from working, thereby depriving petitioners of freedom of speech and assembly, in violation of the due process clause of the Fourteenth Amendment.

7. In affirming the convictions of petitioners under a statute which is vague and indefinite and which restricts free speech and assembly, in violation of the due process clause of the Fourteenth Amendment.

8. In affirming the convictions of petitioners under a statute and charge so indefinite as to deprive petitioners of procedural due process, in violation of the Fourteenth Amendment.

9. In affirming, and in failing to reverse, the convictions of petitioners.

ARGUMENT

Due to the ambiguity of the latest opinion of the Arkansas Supreme Court construing the state statute (Act 193, Acts of Arkansas, 1943, set out *supra*, p. 2), our argument necessarily rests upon alternative assumptions as to the opinion's meaning. Assuming, first, that the State Supreme Court has construed the statute as requiring that the accused must have aided the assemblage (participated in picketing) with the intention that force and violence would be used to prevent another from working, we urge that, by thus affirming the convictions upon an interpretation of the statute different from

that upon which petitioners were tried, the decision below deprived petitioners of procedural due process, in violation of the Fourteenth Amendment, under the decision of this Court in this case last year. *Cole* v. *Arkansas*, 333 U.S. 196. Secondly, we argue that the state statute restricts freedom of speech and assembly in violation of the due process clause of the Fourteenth Amendment: we urge this contention both upon the assumption above stated and upon the alternative assumption that the State Supreme Court's decision construes the statute as requiring nothing more for conviction than that the accused were picketing at a time and place where another used violence to prevent a person from working. Thirdly, regardless of what meaning be given to the latest decision of the Arkansas Supreme Court, we urge that petitioners were deprived of due process of law because their convictions were based upon a charge and a statute too vague and indefinite to conform to constitutional requirements.

I.

THE DECISION OF THE SUPREME COURT OF ARKANSAS DEPRIVED PETITIONERS OF PROCEDURAL DUE PROCESS

Last year this Court held that a prior decision of the Arkansas Supreme Court in this case deprived petitioners of procedural due process. *Cole* v. *Arkansas*, 333 U.S. 196. It is petitioners' contention that the latest decision of the Arkansas court, if it reads into the statute the requirement that the accused must have intended that force and violence be used to prevent another from working, again denies procedural due process to petitioners, in precisely the same ways as before, and that it fails to give proper effect to the decision and mandate of this Court.

In its decision last year this Court held that the Arkansas Supreme Court, by giving to the information a construction different from that which had been given it by the trial court, and by affirming the convictions upon the basis of its construction, had deprived petitioners of procedural due process in two different, although interrelated, ways. This Court held, in

the first place, that the new interpretation given the information by the State Supreme Court had resulted in petitioners standing convicted of a charge on which they had not been tried. And this Court declared (333 U.S. at 201):

> It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

This Court pointed out, secondly, that the State Supreme Court, as a result of its giving the information a construction different from that upon which the case had been tried, had failed to review the issues which petitioners had raised in the trial court and upon which they had appealed. And this Court held that since the proceedings in the State Supreme Court "are a part of the process of law under which the petitioners' convictions must stand or fall" this denial of review violated procedural due process.

We will undertake to show that the latest decision of the Arkansas Supreme Court, under the assumption as to its meaning stated above, deprived petitioners of procedural due process in precisely the same ways as did its earlier decision. Upon that assumption, the Arkansas Supreme Court has given the statute a construction different from that upon which the case was tried. As a first result, petitioners again stand convicted of a charge upon which they were not tried. And as a second result, the State Supreme Court has again in effect refused to review the issues upon which petitioners appealed to it.

1. The information by which petitioners were charged (set out *supra* p. 3) and the trial court's instructions to the jury (set out *supra* pp. 4–5), required nothing more for conviction than that the defendants were participating in picketing when violence was used by another picket to prevent a person from working. Neither the information nor the instructions included as an element of the offense any requirement that the defendants must have participated in the picketing with the intention or knowledge that force and violence would be used.

Specifically, the information did not charge that petitioners

acted in concert with Campbell in his use of force and violence, or that petitioners promoted or aided the assemblage (the picket line) with the intention or knowledge that force or violence would be used, or anything other than that petitioners promoted and aided the assemblage at which Campbell used force and violence. The State's failure to charge petitioners with any responsibility for Campbell's use of force and violence was clearly not inadvertent, since the indictment upon which petitioners were tried the first time did charge that they by force and violence prevented Williams from working. Presumably it was lack of evidence to import to petitioners responsibility for Campbell's violence which led the prosecuting attorney to frame this new charge against petitioners for their second trial.

In contrast, the latest opinion of the Arkansas Supreme Court (discussed in detail *supra* pp. 8–9) may, and for purposes of this argument we assume that it does, read into the statute the requirement that the accused aided the assemblage with the intention that force and violence would be used to prevent a person from working.

2. To read into the statute on appeal this requirement, that petitioners must have participated in the assemblage with the intention that force and violence would be used to prevent another from working, has the result that petitioners stand convicted upon a charge which was not made against them and on which they have not been tried. For, as has been demonstrated, petitioners were not charged by the information with any such conspiracy to assemble and by force and violence prevent another from working. They were charged only with promoting an assemblage (a picket line) at which Campbell—who was alleged to have acted in concert with other persons, but not with petitioners—used force and violence to prevent a person from working.

By deliberate choice of the prosecution, petitioners were not on this trial charged with any responsibility for Campbell's violence. Now, under the State Supreme Court's perhaps deliberately ambiguous opinion, they stand convicted as though they had been charged with and tried for just that. As this

Court held the last time this case was before it, that is not due process of law. *Cole* v. *Arkansas*, 333 U.S. at 201.

3. By construing the statute (if it did) to apply to petitioners only if they planned violence, the State Supreme Court, for the second time, denied petitioners review upon the issues raised by them in the trial court and upon which they appealed.

Petitioners were convicted under a construction of the statute which made criminal their mere aiding of an assembly at which Campbell, not acting in concert with petitioners, used violence to prevent another from working. On their prior appeal, and again on remand from this Court, petitioners sought review of the question whether the statute, so construed, was constitutional.

Under the decision of this Court in this very case last year, for the State Supreme Court to deny petitioners review upon this question deprived them of due process. Yet that is exactly what the Arkansas Supreme Court did, again, if the assumption be correct that it read a requirement of "intent" into the statute. Under that assumption, it did not face the issue of the validity of the statute as construed by the trial court. Rather it gave the statute, not the construction under which petitioners had been tried, but that evidently judged necessary to help the Act's constitutionality. To do that denied review to petitioners and deprived them of procedural due process.

II.

PETITIONERS WERE UNCONSTITUTIONALLY DEPRIVED OF FREEDOM OF SPEECH AND ASSEMBLY BY THEIR CONVICTIONS UNDER A STATUTE WHICH MAKES CRIMINAL PRESENCE ON A PICKET LINE WHERE VIOLENCE IS USED TO PREVENT A PERSON FROM WORKING.

We contend that the conviction of petitioners under the Arkansas statute deprived them of freedom of speech and assembly, in violation of the due process clause of the Fourteenth Amendment. And we do not think that the soundness of that contention is at all affected by whatever interpretation the Arkansas Supreme Court may have put on the statute in its latest opinion.

1. Literally read, the statutory provision under which petitioners were tried and convicted (set out *supra* p. 2) makes it a felony for any person to "promote, encourage or aid" any assemblage at or near any place where a labor dispute exists. For, while the statutory language is "promote, encourage or aid any such unlawful assemblage," the statute contains no definition of what assemblages are "unlawful," and its most natural meaning is that an assemblage "at or near any place where a 'labor dispute' exists" is unlawful.

So read, the statute clearly violates rights of free speech and assembly which the due process clause of the Fourteenth Amendment protects from infringement by the states. *Carlson* v. *California*, 310 U.S. 106; *Thornhill* v. *Alabama*, 310 U.S. 88; *AFL* v. *Swing*, 312 U.S. 321. Those cases establish that striking laborers have a constitutional right to assemble peaceably near the plant which is struck and to express their views on the matter in controversy. Legislation which denies them that right is invalid.

2. It is true that the statute can be construed, with a small sacrifice of literalness, as making the encouragement of the assemblage felonious only if some member of the assemblage engages in violence or threats to prevent a person from working. The statute is so construed in the information, the case was tried upon that basis, and, as we have stated, there is some language in the State Supreme Court's opinion which looks to that construction. That is likewise the interpretation given the statute by the Attorney General of Arkansas in his Brief in Opposition to the Petition for Certiorari. He there states (p. 4):

> The assemblage becomes unlawful when it adopts force and violence as a means of preventing a workman from pursuing his lawful vocation or occupation. When these methods are employed, the prior lawful and peaceable assemblage becomes an *unlawful one*. [Italics in original].

If the statute be given this meaning—that is, that encouraging the assembly becomes felonious on the occurrence of the condition subsequent that any member of the assemblage resorts to violence—it is still clearly invalid under the decisions

of this Court. Since the state may not directly prohibit the encouragement of the assembly, it likewise may not inhibit it, indirectly but no less effectively, by making it criminal upon the occurrence of conduct neither foreseen, participated in nor encouraged by the accused. Cf. *Terminiello* v. *Chicago*, 337 U.S. 1. The liberties guaranteed by the First and Fourteenth Amendments cannot, we submit, be denied by such indirection or circumvention. Cf. *Bailey* v. *Alabama*, 219 U.S. 219; *Grosjean* v. *American Press Co.*, 297 U.S. 233; *Murdock* v. *Pennsylvania*, 319 U.S. 105. If assemblies could be made retroactively unlawful as to all participants upon the commission of a prohibited act by any participant, freedom of assembly would be dead indeed. Cf. *DeJonge* v. *Oregon*, 299 U.S. 353. Furthermore, the imputing of criminal liability to one person for the independent acts of another is itself a deprivation of due process. "Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application." *Kotteakos* v. *United States*, 328 U.S. 750, 772. Cf. *Schneiderman* v. *United States*, 320 U.S. 118, 136.

Unlike the statute before this Court in *Giboney* v. *Empire Storage and Ice Company*, 336 U. S. 490, the Arkansas statute does not make picketing for particular purposes unlawful. Rather, if violence occurs, picketing becomes retroactively a felony.

Nor can the Arkansas statute draw support from such cases as *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U.S. 287, and *Hotel & Restaurant Employees International Alliance* v. *Wisconsin Employment Relations Board*, 315 U.S. 437. To enjoin for the future picketing which is being carried on in a context of violence is one thing. To make lawful picketing retroactively criminal for all participants because of an isolated act of violence, is quite another.

In its Brief in Opposition (p. 5) the State relied heavily on *Ex Parte Frye*, 143 Texas Criminal Reports 9, 156 S.W. 2d 531; and *ex parte Sanford*, 144 Texas Criminal Reports 430, 157 S.W. 2d 899, appeal dismissed for want of a substantial federal question *sub. nom. Sanford* v. *Hill*, 316 U.S. 647. Those cases sustained the constitutionality of a Texas statute which was identical with the Arkansas statute here involved,

and from which the latter was in fact copied. Those cases came up, however, on *habeas corpus* before trial, and the opinions of the Texas courts discuss only Section 1 and the first part of Section 2 of the statute, and proceed throughout upon the assumption that the accused had himself engaged in violence. The Arkansas Supreme Court itself recognized in its opinion (R. 118) that the constitutionality of the last part of Section 2 was not at issue in those cases.

3. As stated, it may be that the latest decision of the Arkansas Supreme Court, in an attempt to help the constitutionality of the statute, gives it yet a third construction, that is, that it applies only to the aiding of an assembly formed for the purpose of engaging in violence.

Such a construction cannot save the statute, for two reasons. In the first place, no such limited construction was given the jury. The jury, therefore, could have found guilt consistently with the instructions merely by finding that the defendants had encouraged the assembly, even though they had not participated in, encouraged, contemplated, or anticipated the occurrence of violence. Indeed, it convicted Bean in the same trial, and as to him the Arkansas Supreme Court itself recognized (R. 107) that the most the evidence showed was that he had been seen near the scene of the altercation. It is apparent that a statute which is invalid if taken at face value cannot be saved by a construction not submitted to the jury. *Bailey* v. *Alabama*, *supra*. Cf. *Screws* v. *United States*, 325 U.S. 91.

In the second place, a statute which regulates speech and assembly is judged not only by the construction which the courts may ultimately give it, but by the inhibiting effect its general words may have upon the exercise of constitutionally protected rights of speech and assembly. *Thomas* v. *Collins*, 323 U.S. 516.

In practical effect, the statute under which petitioners were convicted constitutes a device to evade, through obscurity of language and application, the constitutional protections accorded the right to picket by such cases as *Thornhill* v. *Alabama*, *supra* and *AFL* v. *Swing*, *supra*. According to the

trial court, mere presence on a picket line where violence in fact occurs is a felony. According to the State Supreme Court those present on a picket line may be convicted of a felony if violence occurs and the court thereafter concludes that the picket line was assembled for the purpose of using violence. Under either construction a worker engaging in Arkansas in his constitutional right to picket is under such hazard and such danger of committing a felony that his constitutional right is rendered meaningless.

III.

PETITIONERS' CONVICTIONS WERE BASED UPON A CHARGE AND A STATUTE TOO INDEFINITE TO CONFORM TO DUE PROCESS

That the convictions were based upon a charge and a statute too vague and indefinite to conform to due process could hardly be more manifest.

The information under which petitioners were tried has in successive opinions of the Arkansas Supreme Court been held to charge a crime under Section 1 of the statute; then under the first part of Section 2; and finally under the latter part of Section 2. An information which so utterly confuses the State Supreme Court as to what crime it charges can hardly be said fairly to have informed the accused to the nature of the charges against them.

The statute itself likewise fails to meet the constitutional tests of definiteness. It has already been shown that the portion of Section 2 involved in the present case is plausibly susceptible of at least two different interpretations, and that the State Supreme Court has perhaps given it still a third interpretation. The standards of definiteness which criminal statutes must meet under the due process clause are particularly stringent in the case of statutes which, like the present, are restrictive of free speech and assembly. Vagueness in such a statute presents not only an issue of procedural due process but of restraint of freedom of speech and assembly, in violation of substantive due process. *Winters* v. *New York*, 333 U.S. 507, 509-510; *Thomas* v. *Collins*, *supra*.

CONCLUSION

The Arkansas Supreme Court has in three successive opinions refused to accord procedural due process to petitioners. The statute under which and the information by which petitioners were charged unconstitutionally restrict freedom of speech and assembly, and are too vague and indefinite to conform to due process.

It is, therefore, respectfully submitted that this case should be reversed and remanded to the Supreme Court of Arkansas, with directions that it order that the information be quashed and that no further prosecutions be instigated under the latter part of Section 2 of the Arkansas statute.

Respectfully submitted,

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